

FMLA Leave Basics: Eligibility & Intermittent Leave vs. Continuous Leave

Employees often wonder if they are eligible for leave under The Family Medical Leave Act. The Family Medical Leave Act (“FMLA”) provides up to 12 weeks of unpaid, job-protecting leave per year. Although FMLA leave does not have to be paid, employers in Ohio can choose to pay employees who take FMLA leave, at full salary/benefits or at a portion of salary/benefits.

FMLA leave is available to public sector and private sector employees who work for the following types of employers:

- Public agencies, including state, federal and local employers;
- Local educational agencies (schools);
- Employers who employ over 50 employees for at least 20 workweeks in the preceding or current calendar year.

Employees are eligible for FMLA leave if they meet the following criteria:

- Must have worked for the employer for at least 12 months (total, not consecutive months);
- Have worked at least 1,250 hours for the employer in the 12-month period prior to your FMLA leave;
- Work at a location where at least 50 employees are employed at the location or within 75 miles of the location.

An employee can take FMLA leave for the following reasons:

- The birth of a son or daughter or to care for a newborn child;
- For the placement with the employee of a child for adoption or foster care, and to care for the newly placed child;
- To care for an immediate family member (spouse, child or parent but not “parent-in-law”) with a **serious health condition**;
- When the employee is unable to work because of a **serious medical condition**.

*Leave to care for a newborn child or newly placed adopted/foster child must conclude within the 12 month period after the birth or placement of such child.

Once an employee is eligible for FMLA leave, he or she can request leave and decide what type of FMLA leave is necessary. Employees can choose from continuous or intermittent FMLA leave.

DIFFERENCE BETWEEN INTERMITTENT FMLA LEAVE AND CONTINUOUS FMLA LEAVE

Continuous FMLA leave is FMLA leave that is taken and not broken up by periods of work. Continuous FMLA leave is typically when an employee is absent for three consecutive business days or longer and has been treated by a doctor. For example, a new mother can take twelve (12) weeks off from work to care for her newborn baby. This twelve-week period is considered continuous FMLA leave. Leave to care for a sick family member or leave to receive treatment for your own serious illness may be continuous as well.

Intermittent FMLA leave is an option for employees who want to use FMLA leave in a more flexible manner. Intermittent leave involves the use of days or hours, broken down into increments, to care for a family member with a serious illness or to receive treatment for your own serious illness. An example of intermittent leave is an employee who suffers from a condition that causes “flare-ups” or periods of time where the employee is in pain and cannot attend work. Another example is an employee who is being treated for cancer and must attend chemotherapy or radiation appointments. You may use intermittent FMLA leave to attend these appointments.

Intermittent FMLA leave may be taken in very small increments, like taking two hours to attend an appointment. Only intermittent leave that is actually taken by the employee is counted against the twelve-week time period. Employees are entitled to the same amount of FMLA leave (12 weeks total) whether they elect continuous leave, intermittent leave or a combination of both. Example: If an employee takes five weeks of continuous FMLA leave, recovers enough to return to work but still utilizes intermittent FMLA leave to attend appointments or deal with unexpected symptoms during recovery. Upon return, the employee would still have seven weeks of FMLA leave to use.

Employers typically break down intermittent FMLA leave into 30 minute or 1 hour time periods.

The FMLA provides that employers cannot discriminate or retaliate against an employee who utilizes FMLA leave. To prove a successful FMLA discrimination or retaliation claim, the burden of proof is lower than most other employment discrimination cases, like an ADA disability discrimination case for example. In order to be successful on a FMLA discrimination or retaliation claim, we must only prove that the FMLA leave was a “motivating factor” in the decision to terminate the employee, not the entire reason. This standard is pretty employee friendly, considering most employment laws in Ohio are relatively conservative and require a higher burden of proof, like “but for” causation.